R.D. #0005-03
Teaneck, NJ

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 22**

**GIVAUDAN FRAGRANCE CORPORATION**
Petitioner/Employer

**and** **CASE 22-UC-303**

**LOCAL 815, DRUG, CHEMICAL, COSMETIC, PLASTICS AND AFFILIATED INDUSTRIES WAREHOUSE EMPLOYEES, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO**[1]
Union

## DECISION AND ORDER

The Employer filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to clarify the existing bargaining unit to exclude Experimental Application Chemists (EACs) currently employed at its newly acquired facility in New York City. The Employer's position is that the New York facility is a new facility and the EACs are not part of the contractually recognized unit found in the collective bargaining agreement (CBA). The Union's position is that the Employer's

[1] The name of the Union appears as amended at the hearing.

New York facility is a relocation of unit work and the EACs are part of the contractually recognized unit as set forth in the CBA.

I am dismissing the Petition because, I find, for the reasons described below, that the Employer's New York facility is a separate facility and the EACs employed there cannot be accreted to the existing unit and, therefore, a question concerning representation exists that cannot be resolved by use of a unit clarification proceeding.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding,[2] I find:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union[3] is currently the exclusive bargaining representative of a unit of employees employed by the Employer which is described in the parties CBA as follows:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for its employees now or hereafter to be employed who are covered by this Agreement, employed at its plants at 1775 Windsor Road, Teaneck, New Jersey, and 300 Waterloo Valley Road, Mt. Olive, New Jersey, or at any other location, with regard to wages, hours and other conditions of employment in the appropriate collective bargaining unit which covers all the employees in the Compounding

[2] The parties stipulated that the record consists of a transcript and joint exhibits from an arbitration hearing concerning this issue. Briefs filed by the Employer and the Union have been fully considered.

[3] The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

> Department, assistants in the Laboratory Department, in the Shipping Department, as Stock Clerks, and as Porters or General Laborers in the Warehouse, but shall exclude Supervisory Employees, Cost Accounting, Clerical employees, Chemists, Guards and/or watchmen, and those employees who perform any experimental duties or interdepartmental liaison duties.

4. The Petitioner/Employer seeks to clarify the existing unit by excluding EACs currently employed at the Employer's newly acquired facility in New York City.

## I. FACTS

The Employer is a leading producer of fragrances for personal and household use. Its Fragrance Division, headquartered in Teaneck, New Jersey, operates a production facility in Mt. Olive, New Jersey and creative facilities in Teaneck and New York City, New York. The Employer and the Union are parties to a CBA wherein the Employer recognized the Union as the exclusive bargaining representative of unit of employees employed by the Employer at its Teaneck and Mt. Olive facilities.

The Fragrance Division's products are within one of two categories: fine fragrances (i.e.; colognes, perfumes, and bath and body products) and consumer products (i.e.; soaps and detergents). The Fragrance Division also produces experimental fragrances. These are formulas, not yet on the market, that are developed in conjunction with, and submitted to, the Employer's corporate customers and potential customers for evaluation as part of research and development.

Experimental fragrances are created from a request by one of the Employer's customers. The request is the catalyst for forming a fragrance profile that is presented

to the Employer's creative team for productive development. From this, a recipe is created that fits the fragrance profile. A recipe then is compounded, or mixed into an oil form by combining the ingredients in amounts specified. This process is called compounding and is handled by laboratory technicians, a unit classification. A compounded product is sometimes then applied to a base, supplied by the customer or created by the Employer, which is designed to mimic the customer's product or specifications. This process is called application and is performed by application technologists, a unit classification. Following the application to the base, the mixture is returned to the Perfumer, who shares it with an evaluation team and sales persons for evaluation against the profile.

In 2001, the Employer decided to open a new facility in New York City to house its Fine Fragrance experimental laboratory. Consumer Products, as well as approximately ten percent of Fine Fragrance, were to remain in Teaneck upon the opening of the New York City facility. On July 16, 2001, in preparation of staffing the New York City facility, the Employer posted notices of a new and open position, i.e., EAC. The notice sought applicants for EAC positions and listed a number of essential duties EACs would perform. Those duties included, *inter alia*,: 1) creating experimental fragrances; 2) preparing smelling samples/creating bases; 3) performing color evaluation; 4) supporting the development of line extension products; 5) assisting in the design and execution of presentations; 6) formulating test bases; 7) ensuring quality of sample formulas; 8) utilizing the Sphinx system; 9) identifying materials by scent; 10) maintaining accurate lab records; and, 11) keeping abreast of new products and technology. The EAC position is similar to the Lab Techs position included in the

CBA. The EACs differ from the Lab Techs in that the Employer requires its EACs hold a Bachelor of Science degree in Chemistry or a related field and have effective communication and presentation skills in order to meet with and respond to customers. Aside from these technical requirements placed on EACs, EACs also support Creative Fragrance Management in the development of line-extension products, such as shower gels, body lotions and creams.

The new position was open to all unit employees. Seven employees were hired as EACs for the New York City facility. Of the seven, two were unit employees, three had performed unit work on a temporary basis at Teaneck and the remaining two performed unit work as summer employees at Teaneck. The Employer did not require any employee to transfer to an EAC position at the New York City facility.

On July 17, 2001, the Union wrote the Employer grieving the alleged improper attempt to incorporate recognized union functions into a non-union classification. On July 25, 2001, the Employer responded that the grievance was both premature and not arbitrable.

On or about October 29, 2001, the Employer opened its New York City facility. At this facility, EACs work with Perfumers, but no Lab Techs or Application Technologists are employed. Lab Techs continue to work out of Teaneck. EACs perform both the compounding and applications functions at the New York City facility, of which the compounding function amounts to between 60% and 80% of the EACs time. Laboratory technicians continue to work out of Teaneck, however, their sole function is to perform compounding and are not involved in the application function, which is left to the Application Technologists.

## II. LEGAL ANALYSIS

### A. THE SEPARATE FACILITY PRESUMPTION HAS NOT BEEN REBUTTED

The Board has long-held that the opening of a new facility creates a rebuttable presumption that the unit at the new facility is a separate appropriate unit. *Gitano Distribution Ctr.*, 308 NLRB 1172, 1175 (citing generally, *Haag Drug Co.*, 169 NLRB 877 (1968)). If the presumption is not rebutted, the Board applies a simple fact-based majority test to determine whether the employer is obligated to recognize and bargain with the union as the representative of the unit at the new facility. *Gitano*, supra at 1175 and *Mercy Health Services North*, 311 NLRB 367 (1993). In determining whether the presumption has been rebutted, the Board looks at community of interest factors such as centralized control of daily operations and labor relations, including the extent of local autonomy; similarity of employee skills, functions and working conditions; degree of employee interchange; and, distance between locations. *U.S. Tsubaki, Inc.*, 331 NLRB 327, 328 (2000) (citing *Esco Corp.*, 298 NLRB 837 (1990)).

The record reveals that since the time the New York City facility opened, there has been no interchange of employees, either through rotation, fill-ins or involuntary transfers, between the EACs in New York City and the Lab Techs in Teaneck. EACs are salaried employees earning about $43,000 per annum whereas Lab Techs are hourly employees earning approximately $35,000 per annum. EACs work flexible hours, including hours beyond their normal workday of 8:30 a.m. to 5:00 p.m., who the Employer considers professional and exempt from overtime pay. On the other hand, Lab Techs work a contractually agreed upon work schedule of 8:30 a.m. to 5:00 p.m. and are not considered professional employees by the Employer, thus allowing them to

receive overtime pay. As for benefits, the record is unclear. However, the distinction can be drawn on the basis that EACs are not receiving the benefits Lab Techs do under the CBA.

The record further reveals that the New York City facility operates independent of the Teaneck and Mt. Olive facilities. That is, operations are separate in that the ordering of supplies and raw materials is done on a facility basis. Training is determined on an independent facility basis. Human resources at the New York City facility are different from the human resources at the Teaneck facility. In fact, the first level of common supervision is by the Senior Vice President for Human Resources.

In light of the record testimony, I find that the New York City facility is a new facility and the employees therein constitute a separate appropriate unit. The Union has failed in its effort to rebut the presumption that the employees of the New York City constitute a separate unit. Furthermore, the Union's argument that unit employees in Teaneck were transferred to New York City fails in that the Employer posted the EAC position and allowed unit employees to apply for this non-unit position. No unit employee was required to transfer from Teaneck to New York City. The fact that unit employees applied and were hired as EACs is quite different from the Employer conditioning their employment on transfer.

**B. THE NEW YORK CITY FACILITY CANNOT BE ACCRETED**

An accretion issue may arise in three different contexts: contract bar, a petition for certification, or a petition for unit clarification. The Board follows a restrictive policy in finding accretion because it forecloses employees' basic right to select their bargaining representative. *Towne Ford Sales*, 270 NLRB 311 (1984); *Melbet Jewelry*

*Co.*, 180 NLRB 107 (1970); *see also*, *Giant Eagle Markets*, 308 NLRB 206 (1992). Thus, the accretion doctrine is not applicable to situations where the group to be accreted would constitute a separate appropriate bargaining unit. *Passavant Health Ctr.*, 313 NLRB 1216 (1994) and *Beverly Manor-San Francisco*, 322 NLRB 968 (1997).

I have already established in II A above that the Union failed to rebut the presumption that the New York City facility is a new facility and the employees there constitute a separate appropriate unit. To that end, accretion is not applicable here.

Based on the foregoing and the record as a whole, I find that the New York City facility is a new facility where employees including EACs would constitute a separate appropriate unit, the EACs do not share a community of interest with and do not represent an accretion to the represented employees in New Jersey, and the EACs must be allowed to have a choice in their representation if an appropriate petition is filed.

## ORDER

**IT IS HEREBY ORDERED** that the petition filed herein be, and same hereby is **DISMISSED**.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **July 29, 2003**.

Signed at Newark, New Jersey this 15th day of July, 2003.

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